IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Tuesday, April 19, 1994

FILED
SUPREME COURT
STATE OF OKLAHOMA
APR 19 1994
JAMES W. PATTERSON
CLERK

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * *

79,427 State of Oklahoma ex rel. Department of Transportation v. D-Landco, Inc., an Oklahoma corporation et al.

Certiorari denied.

CONCUR: Hodges, C.J., Lavender, V.C.J., Simms, Hargrave, Wilson, Summers, Watt, JJ.

DISSENT: Opala, Kauger, JJ.

S/S Ralph B. Hodges
CHIEF JUSTICE

NOT FOR PUBLICATION
IN THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA
DIVISION NO. III

Case No. 79,427

FILED
COURT OF APPEALS
STATE OF OKLAHOMA
DEC 28 1993
JAMES W. PATTERSON
CLERK

STATE OF OKLAHOMA, ex rel.
DEPARTMENT OF TRANSPORTATION,
Appellee,
vs.
D-LANDCO, INC., an Oklahoma Corporation; **BARBARA LASH;** and **THE TULSA COUNTY TREASURER,**
Appellants.

APPEAL FROM THE DISTRICT COURT
OF TULSA COUNTY, OKLAHOMA
HONORABLE RONALD L. SHAFFER, JUDGE

AFFIRMED

Louis Levy,
Tulsa, Oklahoma, For Appellants,

Stephen P. Gray,
Tulsa, Oklahoma, For Appellee.

OPINION

Opinion by Stewart M. Hunter, Presiding Judge:

On February 23, 1990, the State of Oklahoma filed this action on behalf of the Department of Transportation,

(ODOT), seeking condemnation of 28 acres of a 139 acre tract of land in Tulsa County needed for construction of the Mingo Valley Expressway. D-Landco, Inc., (Landowner), was the owner of the tract of land.

Two court-appointed commissioners valued the 28 acres at $1,200,000. The third commissioner valued the property at $605,620 in a minority report. Both parties demanded a jury trial.

At trial, Landowner attempted to show that the value of the 28 acre tract of land in question was adversely affected by the failure of the Tulsa Metropolitan Area Planning Commission, (TMAPC) to upgrade the zoning of the land. Five years before this condemnation action was filed, Landowner had applied to the TMAPC for rezoning of the entire 139 acres from AG, denoting land used for agricultural purposes, to CO or "corridor zoning," which is limited to land adjacent to existing or planned freeways. The TMAPC granted the application for CO zoning for all of Landowner's land except the 28 acres upon which a portion of the proposed Mingo Valley Expressway would actually lie. Landowner neither contested the action of the TMAPC nor sought another zoning classification for the 28 acres.

Landowner presented witnesses who testified that the value of the 28 acres was lower because of the AG zoning. Landowner also presented witnesses who testified that the TMAPC had a policy of denying applications for changes in zoning on lands designated for future public use. These witnesses testified that the purpose behind the policy was to save public monies.

ODOT presented a witness who testified that "corridor zoning" is available only for land adjacent to an existing or planned freeway. In other words, land, such as the 28-acre tract in question, upon which an expressway is to built, is not in a "corridor district" and would not be eligible for corridor zoning.

ODOT also called Janice K. Gordon, an appraiser, who testified about the value of the land. Landowner objected because Gordon's husband had been in the court room throughout the trial. According to Landowner, allowing Gordon to testified violated the rule of sequestration previously invoked by the District Court. The District Court held an in camera examination of Gordon, and she testified that nothing she had discussed with her husband would affect her testimony.

At the conclusion of the four-day trial, the District Court entered judgment on a jury verdict valuing the land at $708,220.

On appeal, the Landowner argues: (1) its due process rights to a fair trial were violated by TMAPC's refusal to grant the application for rezoning of the 28 acres; and (2) the District Court erred in allowing the testimony of Gordon in violation of the rule of sequestration.

STANDARD OF REVIEW

We exercise independent judgment both on questions of law and interpretation of facts when reviewing assertions of violations of constitutional rights. *Ranola Oil Co. v. Corporation Commission*, 752 P.2d 1116, 1118 (Okla. 1988).

We review alleged violations of the sequestration rule for abuse of discretion. *See Clark v. Continental Tank Co.*, 744 P.2d 949, 950-953 (Okla. 1987).

FINDINGS ON REVIEW

Landowner complains that its constitutional rights have been violated by the actions of the TMAPC, which is not a party to this case. Landowner was not, however, denied due process; rather, it failed to use the process available to it. By failing to appeal the zoning decision of the TMAPC, Landowner has long since waived any right to review the TMAPC's zoning decision. Therefore, this issue is not properly before this Court. *See Patterson v. Stanolind Oil & Gas Co.*, 77 P.2d 83, 95 (Okla. 1938) (due process issue not properly before court where no appeal taken from order complained of).

The record does not support the alleged abuse of discretion in allowing the testimony of Janice Gordon. The District Court's examination of Gordon supports its decision to allow her testimony.

For these reasons, the judgment of the District Court is AFFIRMED.

BAILEY, J. and GARRETT, J. concur.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

DISTRICT COURT
FILED
APR 13 1992
Don E. Austin, Court Clerk
State of Okla. Tulsa, County

FILED
SUPREME COURT
STATE OF OKLAHOMA
APR 13 1992
JAMES W. PATTERSON
CLERK

Supreme Court Case No. 79427
Tulsa District Court Case No. CJ-90-0958

STATE OF OKLAHOMA, ex rel.,
DEPARTMENT OF TRANSPORTATION,
Appellee,

vs.

D-LANCO, an Oklahoma Corporation;
BARBARA LASH; and the
TULSA COUNTY TREASURER,
Appellant

PETITION IN ERROR (AND PRELIMINARY STATEMENT)

__X__ PETITION IN ERROR ___ CROSS-PETITION

____ AMENDED PETITION ___ COUNTER-PETITION

If the petition is an amended petition state purpose of amendment. N/A

If the petition is a cross-petition or counter-petition state the date that the original petition in error in the appeal was filed with the Clerk of this Court. N/A

Type of Case in Supreme Court:

__X__ Judgment or Final Order of District Court (Rule 1.10)
____ Corp. Commission (oil & Gas) (Rule 1.85)

_____ Corp. Commission (Utility) (Rule 1.85)
_____ Insurance Dept. (Rule 1.55)
_____ Tax Commission (Rule 1.125)
_____ Court of Tax Review (Rule 1.140)
_____ Banking Board or Commissioner (Rule 1.155)
_____ Other (Explain) _____

_____

A. TRIAL COURT HISTORY

COURT/TRIBUNAL: **DISTRICT COURT**
COUNTY: **TULSA**
CASE NO.: **CJ-90-0958**
JUDGE: **HONORABLE RONALD SHAFFER**

ALL QUESTIONS MUST BE ANSWERED
(Insert N/A in the blanks provided if the particular, question is not applicable to the appeal).

DATE OF JUDGMENT OR ORDERED APPEALED PRONOUNCED:

March 12, 1992

(Date may or may not be date of instrument)

DATE THE JUDGMENT OR ORDER WAS FILED

Has not yet been filed.

(Date instrument was filed)

Amended Petition-in-Error will be filed when available (within thirty [30] days) Tulsa District Court Minute (Certified) attached as temporary substitute reference to jury verdict.

WAS APPELLANT OR APPELLANT'S ATTORNEY PRESENT WHEN THE JUDGMENT OR ORDER WAS PRONOUNCED? __X__ YES ____NO

WAS A PARTY OR CLERK DIRECTED TO MAIL A COPY OF THE JUDGMENT OR ORDER TO THE APPELLANT? ____YES __X__NO

IF MAILING A COPY OF THE JUDGMENT OR ORDER WAS DIRECTED DOES THE TRIAL COURT RECORD SHOW THAT THE JUDGMENT OR ORDER WAS MAILED TO THE APPELLANT WITHIN FIVE (5) DAYS OF THE DATE THE JUDGMENT OR ORDER WAS FILED? ___ YES ___NO

IF MAILING WAS ORDERED, ON WHAT DATE WAS THE ORDER MAILED TO THE APPELLANT?

BY DISTRICT CLERK N/A

BY OTHER PARTIES:

Date mailed	Name of party who mailed the order.
1. N/A	N/A
2. _____	_____
3. _____	_____

List all parties who mailed a copy of the order or judgment to the appellant and the dates mailed by each of those parties as reflected by the proof of service filed with the District Court Clerk.

POST-TRIAL MOTION? No.

Type and Authority	Dated Filed in Trial Court
1. N/A	N/A
2. _____	_____
3. _____	_____

DATE OF DISPOSITION OF POST-TRIAL MOTION OR MOTIONS

Type	Date Disposed in Trial Court
1. N/A	N/A
2. _____	_____
3. _____	_____

B. DISPOSITION IN TRIAL COURT OR TRIBUNAL

NATURE OF JUDGMENT OR ORDER APPELLANT SEEKS TO REVERSE:

Jury verdict.

RELIEF SOUGHT BY APPELLANT:

Reversal and remand for new trial.

RELIEF GRANTED BY TRIAL COURT OR TRIBUNAL:

Money judgment in favor of defendant/appellant D-LANDCO (landowner) for $708,220.00.

RELIEF SOUGHT BY APPELLEE:

Affirmation.

JUDGMENT ON LESS THAN ALL CLAIMS OR PARTIES:

DID THE TRIAL COURT ADJUDICATE LESS THAN ALL OF THE CLAIMS OR PARTIES PRESENTED?

____YES _X_NO

IF SO DID THE TRIAL COURT MAKE AN EXPRESS DETERMINATION THAT LESS THAN ALL OF THE CLAIMS OR PARTIES PRESENTED SHOULD BE DECIDED AND EXPRESSLY DIRECT THE FILING OF A FINAL JUDGMENT? ____YES _X_NO

EXHIBIT "A"

Amended Petition-in-Error will be filed when available (within thirty [30] days) Tulsa District Court Minute (Certified) attached as temporary substitute reference to jury verdict.

C. SUMMARY OF CASE

Exhibit "B" attached: Please see attachment

D. ISSUES AND ERRORS PROPOSED TO BE RAISED ON APPEAL

State with specificity each point of law urged as error:

1. Rusty Richardson, Appellee ODOT's appraiser, testifying about $7,500.00 per acre sale price in 1981 (9 years before condemnation of land) of Tulsa Junior College land, after a motion in limine on sales "too remote in time" had been sustained and not in response to any question.
2. Rusty Richardson, Appellee ODOT's appraiser, testifying to property which was a voluntary utterance sales that were not listed in his appraisal report or provided to opposing counsel before trial but intentionally withheld from Appellant.
3. The Appellant landowners were not allowed to show its house being razed or problems created by construction in front of property which goes to the issue of "loss of access" damages for the house. Defendant did not receive "loss of access" damages as a result of the exclusion of the photos and testimony.
4. Jan Gordon, ODOT appraiser, and her husband, also an ODOT appraiser in another case, violated the rule of sequestration and she was allowed to testify after

the judge overruled an objection by Appellant's counsel.

5. Jan Gordon, ODOT witness, violated the hearsay rule when she testified that the basis of her "highest and best use" opinion was information given to her from other people who were not in the courtroom and were not subject to cross-examination.

6. A Motion in Limine to preclude Appellee's use of the Tandem/Chognard sale was overruled. This was not an "arms-length" transaction and should not have been allowed as a comparable sale to be used by Mr. Rusty Richardson.

7. The verdict resulted from Appellant's property being put in a "deep freeze" by zoning actions of the City of Tulsa working in conjunction. with Appellee (ODOT) to place a "No-Building" moratorium on Appellant's (D-Landco) property.

8. Appellant was denied due process and equal protection in violation of the Oklahoma and United States Constitutions by the TMAPC staff working in conjunction with ODOT. They placed Appellant's land in an agricultural (AG) zoning category so that it could not be productively used during interim and reserved it for condemnation at a lower than market price.

9. The jury disregarded the "highest and best use" instruction given by the Court and valued the Appellant's land at agricultural (AG) single or family homesite—not commercial industrial values.

10. The $708,220.00 verdict does not reflect the "highest and best" use of Appellant's property without government interference.

11. Appellant/D-Landco did not receive just compensation as mandated by the provisions of *Art. II, Section 24 of the Oklahoma Constitution* and *Art. V, of the United States Constitution.*

12. The cumulative effect of all the errors was to deny Appellant/D-Landco a fair trial, due process and equal protection of the laws under both the Unites States Constitution and the Oklahoma Constitution.

ANY RELATED OR PRIOR APPEALS:

___ YES NO _X_

If so, identify by style, citation if any, and Supreme Court Number. N/A

Style	Number	Citation

Court Reporters' estimate of number of transcribed pages: 960

CHECK THE APPLICABLE ISSUES INVOLVED IN THE APPEAL:

___ 01	Administrative Law and Procedure
___ 02	Appeal and Error
___ 03	Attorneys
___ 04	Bankruptcy
___ 05	Banks and Banking
___ 06	Bond Forfeitures
___ 07	U.C.C.
_X_ 08	Constitutional
___ 09	Contracts
___ 10	Corporation Commission
___ 11	Corporations & Partnerships
___ 12	Courts
_X_ 13	Damages

___ 14	Estates, Trusts, and Guardianships
___ 15	Family Law
___ 16	Insurance
___ 17	Labor Law
___ 18	Manufacturer's & products Liability
___ 19	Oil & Gas Law
X 20	Procedure
X 21	Property Law
___ 22	Schools & School Districts
___ 23	Taxation
___ 24	Torts
___ 25	(No number 25)
___ 26	Water Law
___ 27	Government
___ 28	42. U.S.C. § 1983
___ 29	Jurisdiction & Venue
___ 30	Elections/Initiative Petitions
___ 31	Prisoners
___ 32	Arbitration
___ 33	Securities
___ 34	Consumer Law
___ 35	Patents & Trademarks
___ 36	Indian Law
___ 37	Municipal Law
___ 38	Governmental Tort Claims Act
___ 39	Garnishment & Execution
___ 40	Discovery
___ 41	Licenses
X 42	Evidence
___ 43	Guaranty & Suretyships
___ 44	Liens, Mortgages & Notes
___ 45	Interest

List by general topic as set forth above any other issues involved in this appeal:

Eminent Domain

E. ALL APPELLANTS MUST SHOW HOW THE APPEAL IS TIMELY BROUGHT

Place an "X" in the appropriate category the appellant is relying on to show a timely appeal.

I. JUDGMENTS AND FINAL ORDERS OF THE DISTRICT COURT

THE APPEAL FROM THE JUDGMENT OR FINAL ORDER HEREIN IS TIMELY BROUGHT BECAUSE:

1. THE PETITION IN ERROR WAS DELIVERED TO THE CLERK OF THE SUPREME COURT WITHIN THIRTY DAYS OF THE DATE THE JUDGMENT OR FINAL ORDER WAS:

____X____A. FILED WITH THE DISTRICT COURT CLERK, OR

_____B. MAILED TO THE APPELLANT BY THE DISTRICT COURT CLERK OR ANOTHER PARTY AND THE COURT RECORDS DO NOT REFLECT THE MAILING OF A COPY OF THE JUDGMENT WITHIN FIVE DAYS OF ITS FILING, OR

2. THE PETITION IN ERROR WAS MAILED TO THE CLERK OF THE SUPREME COURT BY U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED, ON _____(date mailed), AND

THE STATED DATE OF MAILING WAS WITHIN THIRTY DAYS OF:

_____A. THE DATE THE JUDGMENT WAS FILED WITH THE DISTRICT COURT CLERK OR

_____B. THE DATE THE JUDGMENT WAS MAILED TO THE APPELLANT BY THE DISTRICT COURT CLERK OR ANOTHER PARTY AND THE COURT RECORDS DO NOT REFLECT THE MAILING OF A COPY OF THE JUDGMENT WITHIN FIVE DAYS OF ITS FILING, OR

II. FINAL ORDERS OF OTHER TRIBUNALS

THE APPEAL HEREIN IS FROM A FINAL ORDER OF A TRIBUNAL: N/A

THE APPEAL HEREIN IS TIMELY BROUGHT BECAUSE:

N/A A. THE SPECIFIC STATUTORY AUTHORITY FOR THE APPEAL PROVIDES THAT THE PETITION IS ERROR SHALL BE FILED IN THE SUPREME COURT WITHIN THIRTY DAYS OF THE DATE THE ORDER WAS RENDERED OR PRONOUNCED AND THE PETITION IN ERROR WAS:

N/A 1. Mailed to the Clerk of the Supreme Court by U.S. Certified Mail, return receipt requested, on

_____

N/A 2. Delivered to the Office of the Clerk of the Supreme Court for filing within thirty days of the date the order was rendered or pronounced. OR

N/A B. THE SPECIFIC STATUTORY AUTHORITY FOR THE APPEAL PROVIDES THAT THE PETITION IN ERROR SHALL BE FILED IN THE SUPREME COURT WITHIN THIRTY DAYS OF THE DATE THE ORDER WAS MAILED TO THE APPELLANT AND THE PETITION IN ERROR WAS:

N/A 1. Mailed to the Clerk of the Supreme Court by U.S. Certified Mail, return receipt requested, on AND The stated date of mailing was within thirty days of the date the order was mailed to the appellant. OR

N/A 2. Delivered to the Office of the Clerk of the Supreme Court for filing within THIRTY days of the date the order was mailed to the appellant. OR

N/A C. _____

_____

F. IS APPELLANT WILLING TO PARTICIPATE IN AN ATTEMPTED SETTLEMENT OF THE APPEAL BY PREDECISIONAL CONFERENCE UNDER COURT OF APPEALS RULE 3.7 IF OFFERED THE OPPORTUNITY?

X YES NO___

G. IS APPELLANT AGREEABLE TO ACCELERATE PROCEDURES FOR THIS APPEAL UNDER COURT RULE?

____YES NO X

(Fast Track)
Exhibit "D" Attached:

H. NAME OF COUNSEL

ATTORNEY FOR APPELLANT:

LOUIS LEVY
5314 South Yale,
Suite 310
Tulsa, Oklahoma 74135-6246
(918) 496-9258

ATTORNEY FOR APPELLEE:

STEPHEN GRAY
PICKARD, MILLER & GRAY
4870 S. Lewis
Suite 200
Tulsa, Oklahoma 74105
(918) 747-9797

MARK CAYWOOD
CATHY HOOD
State of Oklahoma
Dept. of Transportation
200 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-2681

I. DATED April 11, 1992 Verified by:

Respectfully submitted,

By: S/S Louis Levy
LOUIS LEVY, OBA 5396
5314 South Yale, Suite 310
Tulsa, Oklahoma 74135-6246
(918) 496-9258

Attorney for Appellant
D-LANDCO

J. AFFIDAVIT OF MAILING TO APPELLEE AND DISTRICT COURT CLERK ON DAY OF FILING IN SUPREME COURT

I, LOUIS LEVY, hereby certify that a true and correct copy of the above and foregoing Petition in Error was mailed this 13 day of April, 1992 to STEPHEN GRAY, MARK CAYWOOD and CATHY HOOD, by depositing it in the U.S. Mails, postage prepaid.

I further certify that a copy of the above and foregoing Petition in Error was filed in the office of the Court Clerk of Tulsa County on the 13 day of 1992.

S/S Louis Levy
LOUIS LEVY

SUMMARY OF CASE Exhibit "B"

This is a condemnation case involving the taking of property for a portion of the Mingo Valley Expressway in the City of Tulsa by the Appellee, Oklahoma Department of Transportation (ODOT). The Trial Court action was brought pursuant to *Art. II, Section 24 of the Oklahoma Constitution;* and *Title 69 O S. §1208* relating to eminent domain.

Appellee condemned fee simple title to 28.09 acres of land; a house; a temporary construction easement; and street access rights. The Mingo Valley Expressway is a project of the State of Oklahoma at the point where Appellant/D-Landco's property is located. Appellant/D-Landco, Inc. is a family corporation in which title to the subject property is held. Mr. Bill Armstrong, his son and daughters are owners of all shares of capital stock of the corporation. The subject property has been owned by Mr. Armstrong since 1971.

This is a "partial" taking of property. The 28.09 acres was a part of a larger tract owned by Appellant/D-Landco, Inc. in 1990 of 139 acres. Approximately 112 acres remains owned by D-Landco. Inc.

This action was filed on February 23, 1990. Commissioners were appointed and report made assessing damages resulting from the condemnation taking at $1,200,000.00. Both parties filed a demand for Jury trial. Trial occurred from March 9-12, 1992 and nine members of a Tulsa County jury returned a verdict of $708,220.00 in favor of the Appellant landowner.

This jury verdict and judgment rendered thereon is appealed by Appellant/D-Landco, Inc. (Landowner).

IN THE DISTRICT COURT FOR TULSA COUNTY,

STATE OF OKLAHOMA.

Case No. CJ-90-0958

THE STATE OF OKLAHOMA, ex rel.

Department of Transportation,

Plaintiff,

vs.

D-LANDCO, an Oklahoma corporation,

and **BARBARA LASH,**

Defendants.

VERDICT FORM

We, the jury impaneled and sworn in the above-entitled cause, do, upon our oaths, find the issues for the defendants and fix recovery at $ 708,220.

1. Britt Watson
2. Debra K. Field
3. Calvin T. Langston
4. Patsy Baker
5. Melvin W. Kay
6. Shawnna Jones
7. Edward R. Rudkin
8. Michael Eugene Mayo
9. William C. Gray
10. _____
11. _____
12. _____

Jurors concurring.

Foreman Britt Watson

CLERK OF THE DISTRICT COURT
TULSA COUNTY OKLAHOMA

DAILY MINUTES FOR DATES: 03/12/92 TO 03/12/92

****

MINUTES ENTERED BY: BARBARA B. HEINEN

CASE NUMBER	PLAINTIFF	DEFENDANT
CJ-90-000958-01	State of Oklahoma	D Landco Inc.

BBH 03/12/92 5971 Real Property — State
XJT Shaffer Ronald: Jury Trial of 3-9-92, 3-12-92.....

Case called for Jury Trial. Both sides present in open court and announce ready for trial. Plaintiff present and represented by Stephen Gray. Defendant present and represented by Louis Levy.

The jurors are called and sworn to qualifications. the jury is IMPANELLED AND EXAMINED FOR CAUSE. THE following juror is excused for cause Judy Lane. The jurors are accepted for cause.

PEREMPTORY CHALLENGES

PLAINTIFF: Dartanier Patton, Jamie Hinnen, Bryan McIntosh.

DEFENDANT: Aaron Johnson. Regina Partman. Amy Smith.

The following jurors are accepted and sworn to try the cause:

Knox Oglee. Edward Reed. Melanie Ray. Michael May. Patsy Baker. Alfred Marietta. Valerie Thompson, Debra Briscoe-Field. William Bayman. Shawnna Jones. William Usry. Britt Wasson.

Opening statements are made. 13 witnesses sworn. Rule was invoked.

BBH 03/12/92 5971 Real Property — State
XCONT (Continuation of above minute).....

REPORTER Kathie Schiermeister. Defendant present evidence and rests. Plaintiff presents evidence and rests. Both sides rest. The jury is instructed as to the law. Closing arguments are made.

DISTRICT COURT
FILED
APR 10 1992
DON E. AUSTIN,
COURT CLERK
STATE OF OKLA. TULSA, COUNTY

CLERK OF THE DISTRICT COURT
TULSA COUNTY OKLAHOMA

DAILY MINUTES FOR DATES: 03/12/92 TO 03/12/92

****

CJ-90-000958-01

MINUTES ENTERED BY: BARBARA B. HEINEN

The swearing of the Bailiff is waived and at 2:44 P.M. the jury retires for deliberation in custody of the Bailiff. At 4:53 P.M., jury returns into open court with their verdict, which is read in open court, ordered recorded and filed, and it, to wit: "We the jury impaneled and sworn in the above entitled cause do upon our oaths find the issues for the deft and fix recovery at $708,220. Jurors concurring, signed Britt Wasson Foreman." Jury discharged. Witnesses sworn: Michael D. Case, Robert Mellott, Robert Parmelee, William Dale Armstrong, Expert Witnesses: Wayne Alberty, Ned Schmidt, Dale Keele, Jack Spradling, Christine Lietzke, Michael L. Buchert, Robert F. Gardner, Jan Gordon, Rusty Richardson.

DISTRICT COURT
FILED
APR 10 1992
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA, COUNTY

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

Case No. CJ 90-0958

DISTRICT COURT
F I L E D
APR 01 1992
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA,
COUNTY

THE STATE OF OKLAHOMA, ex rel.
DEPARTMENT OF TRANSPORTATION;

Plaintiff,

vs.

D-LANDCO INC., an Oklahoma corporation; **BARBARA LASH;** and **THE TULSA COUNTY TEASER,**

Defendants.

ORDER

COMES NOW the District Court and being fully advised of the premises finds as follows:

1. The plaintiff, the State of Oklahoma ex rel. Department of Transportation instituted a lawsuit in eminent domain to acquire part of the defendant's property.

2. Commissioners were appointed and the Commissioners returned a Report of Commissioners of $1,200,000.00 on June 8 1990. ODOT deposited said money into court.

3. A jury trial was had in this matter from March 9-12, 1992 and a jury verdict was returned in the sum of $708,220.00.

NOW THEREFORE, being fully advised of the premises, the court hereby orders the defendant, D-Landco Corporation, to pay to the State of Oklahoma ex rel. Department of Transportation the difference between the commissioners' award and the jury verdict in the sum of $491,780.00.

S/S Ronald L. Shaffer
Judge of the District Court

IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

Case No. CJ-90-0958

DISTRICT COURT
FILED
MAY 31 1990
DON E. AUSTIN, COURT CLERK
STATE OF OKLA., TULSA, COUNTY

STATE OF OKLAHOMA, ex rel.
Department of Transportation,

Plaintiff,

vs.

D-LANDCO., an Oklahoma Corporation;
BARBARA LASH; and,
THE TULSA COUNTY TREASURER,

Defendants.

OBJECTION AND EXCEPTION TO REPORT OF COMMISSIONERS

COME NOW the Defendants, **D-LANDCO**., an Oklahoma Corporation; **BARBARA LASH,** and object to the Report of Commissioners filed herein on May 25, 1990 and take the following exceptions to said Report as follows:

1. The Report of Commissioners does not reflect an appraisal of "severance" damages to the land owned by Defendants and by reason thereof said Commissioners have not considered all of the "special" injuries which the Defendants have sustained by reason of the Plaintiff's taking their property.

2. The Report of Commissioners does not reflect an appraisement of land being taken by the Plaintiff for the highest use and benefit of the Plaintiff.

3. The Report of Commissioners does not reflect an itemized appraisement of the injuries which these Defendants will suffer by reason of the "taking" of Defendants property for roadway purposes of this property and for this reason said report is defective.

WHEREFORE, the Defendants, **D-LANDCO**., an Oklahoma Corporation; **BARBARA LASH**, pray for an evidentiary hearing in this case to ascertain all facts relating to the Defendants' property and grant a dismissal of the Petition filed by the Plaintiff or such other equitable relief as the Court may deem proper.

LOUIS LEVY, INC.
By: S/S Louis Levy
5314 South Yale, Suite 310
Tulsa, Oklahoma 74135.
(918) 496-9258

Attorney for Defendants
D-LANDCO and BARBARA LASH

CERTIFICATE OF MAILING

I, LOUIS LEVY, certify that on the 30 day of June, 1990 I mailed a true and correct copy of the above instrument to:

E. H. Purcer
Cathy S. Hood
Staff Attorneys

Department of Transportation
200 N.E. 21st Street
Oklahoma City, Oklahoma 73105

with sufficient prepaid postage to entitle same to due passage in the United States mail.

S/S Louis Levy
LOUIS LEVY

IN THE DISTRICT COURT FOR TULSA COUNTY, STATE OF OKLAHOMA.

Case No. CJ-90-958

DISTRICT COURT
FILED
OCT 01 1992
DON E. AUSTIN, COURT CLERK
STATE OF OKLA. TULSA, COUNTY

THE STATE OF OKLAHOMA, ex rel.
Department of Transportation,

Plaintiff,

vs.

D-LANDCO, an Oklahoma corporation,
and **BARBARA LASH,**

Defendants.

RECORD OF PROCEEDINGS had in the above-entitled cause on March 9, 10, 11, and 12, 1992, before the Honorable Ronald L. Shaffer, Judge of the District Court of Tulsa County, State of Oklahoma, and a jury of twelve.

APPEARANCES:

MR. STEPHEN P. GRAY
2865 East Skelly Drive, Suite 205
Tulsa, Oklahoma
Attorney for the Plaintiff

MR. LOUIS LEVY
5314 South Yale, Suite 310
Tulsa, Oklahoma
Attorney for the Defendants

REPORTED BY:

Kathie Schiermeister, CSR, CP-RPR, CM
Official District Reporter

VOLUME I of III
(pp. 2-227)

DISTRICT COURT OF OKLAHOMA
Official Transcript - Copy

TESTIMONY OF WAYNE ALBERTY, CITY PLANNER:

Q. What was the vote of the planning commission at that time? What action did they take?

A. Their vote was unanimous. It was 8-0.

Q. All right. And in the vote did they exclude the 28 acres?

A. Yes, they did. Did you wish me to read the motion?

Q. Read the staff recommendation that appears in those minutes, if you will, Mr. --

A. Are you asking for the entire staff recommendation or just the part that applies to the exclusion of the right of way?

MR. GRAY: Your Honor, I'm going to object. I think that the minutes and Defendant's Exhibit No. 2 speaks for itself.

THE COURT: I understand. But it might be helpful to read portions of it, counsel.

Q. Do you see the portion of the minutes that is headed "staff recommendation"?

A. Yes, sir, I do. There is a conclusion in the minutes and that's only a paragraph if you'd like for me to read that. It's only a short statement.

Q. All right, would you please read that to the jury.

A. Okay, this is the staff recommendation that's recorded in the minutes of the Tulsa Metropolitan Area Planning Commission on June 12th, 1985. "Conclusion: Similar to the zoning on the south half of this section, the staff can support CO zoning on the subject tract, less and except that portion located in the proposed Mingo Valley Freeway, which should remain AG."

Q. All right. Was the vote of the planning commission consistent with that?

A. Yes, it was.

Q. Read the vote of the planning commission for us, please, on the next page.

A. "TMAPC action: Eight members present. On the motion of Young, the planning commission voted 8-0, with Carnes, Connery, Draughon, Harris, Kempe, Wilson, Woodard, Young, aye. No nays. No abstentions. Higgins, Paddock, VanFossen, absent. To recommend to the board of city commissioners that the following described property be rezoned CO, less and except an AG tract for the purposes of the Mingo Valley Freeway, as recommended by staff."

Q. The planning commission is or is not a recommending body to the city council on planning?

A. Is a recommending body.

Q. Did this recommendation go to the city council?

A. Yes, sir, it went to the city commission at that time in '85.

Q. And did they adopt it?

A. Yes, they did.

Q. And did it become the ordinance that placed zoning on this property?

A. Yes, it did.

Q. Why wasn't the entire 139 acres placed in a CO zoning district as D-Landco requested? If you know.

A. By policy of the staff to recommend exclusion of the portions that's within a proposed right-of-way take.

Q. And what's the purpose of that recommendation of the staff?

A. I think it's a clear-cut purpose to attempt to hold down the value on property. So that when the public agency is ready to purchase it —

MR. GRAY: Your Honor, I have to object to this response as being narrative in this response to the question.

MR. LEVY: He's already testified that's what the code provides.

THE COURT: I'll overrule.

A. It is so stated in the zoning code. It's Provision C under the provisions of the Tulsa Zoning Code, agricultural district provisions.

Q. And that's what happened to the 28 acres of the D-Landco property, isn't it?

A. Yes, that's correct.

Q. And it's stayed AG ever since, hasn't it?

A. That's correct.

TESTIMONY OF BOB PARMELE, CHAIRMAN:

Q. All right, sir. Can you tell the jury what the D-Landco property was zoned in 1985?

A. Agricultural.

Q. That's the 28 acres that's being taken for the expressway?

A. Well, the entire property I think was zoned agricultural prior to the application for zoning.

Q. I see, sir. You're talking about when the application was actually filed.

A. Okay, the entire property was zoned agricultural.

Q. All right, sir. And tell us what you noticed from the proceedings as to how they went about rezoning the property. What happened?

A. The application was for corridor zoning, CO, on the entire tract. As I recall, the staff recommendation was for approval of CO zoning on the tract except for the 28 acres, I believe, that was reserved for future right of way of the Mingo Valley Expressway.

Q. Is there a policy of reserving future expressway for the Mingo Valley Expressway and not rezoning it? At the staff level?

A. I think at the staff level, the policy is not to recommend approval of rezoning in future expressway right of way.

Q. And why does the staff have that policy? If you know.

A. My opinion is that they feel that by reserving that right of way, it changes the value of the property.

Q. Up or down, sir?

A. Downward.

IN CAMERA EXAMINATION OF JAN GORDON

BY MR. LEVY:

Q. Your name is Mrs. Jan Gordon?

A. Yes.

Q. And you're an appraiser?

A. Yes.

Q. And you live and work in Broken Arrow, Oklahoma.

A. Yes, sir.

Q. And you are going to be a witness in the case that is now on trial in Judge Shaffer's court known as ODOT versus D-Landco.

A. Yes, sir.

Q. And you are prepared to testify this afternoon or tomorrow morning in this trial; is that correct?

A. Yes, sir.

Q. You have not previously attended any trial proceedings of this case, have you?

A. No, I haven't been here.

Q. All right. Your husband is named David Gordon. Is that correct?

A. Yes, sir.

Q. Has David Gordon been in attendance at these trial proceedings the last three days, according to your knowledge?

A. Yes, sir.

Q. And how do you happen to know that?

A. He called and told me that he was here and told me that's why he was going.

Q. All right. How many times has your husband talked to you in the last three days about where he has been?

A. I don't know that I could say a number. I don't know.

Q. More than once?

A. Yes.

Q. All right. Has he told you that he has been in this particular trial, observing the trial proceedings, more than once?

A. Yes.

Q. All right. More than twice maybe?

A. Well, I guess if he's been here three days.

Q. Okay. He stays in contact with you rather regularly, I assume?

A. Probably twice a day.

Q. All right. And you stay in touch with him likewise?

A. When he calls. I can't call him.

Q. Okay. And that's how you know that he has been here. Is that right? By the telephone calls.

A. Yes.

Q. All right. Tell us what he has told you about the proceedings. What he has observed and what he has heard.

Q. Okay. And what did that mean to you?

A. I had looked at that to see if there was anything to equate it to in the marketplace.

Q. And that's really the reason you had been hired in this case, to make that kind of determination, isn't that right?

A. To determine the land use of the property, yes, sir.

Q. And, specifically, to determine whether Mr. Alberty's plan is feasible in the marketplace.

A. I don't think that's quite a true statement because —

Q. Is it partially true?

A. Well, I will put it this way. My assignment was to look at the land uses before I ever knew of Mr. Alberty or his plan.

Q. But at some point you did know about Mr. Alberty's plan, didn't you?

A. Yes, sir.

Q. And it was specifically given to you for a determination of the question of whether Mr. Alberty's plan was feasible in the current marketplace. Isn't that right?

A. Yes, sir.

Q. And you're prepared to testify that it's not feasible in the current marketplace?

A. Yes, sir. Q. All right.

MR. LEVY: I don't have any further questions, Your

CERTIFICATE

STATE OF OKLAHOMA)
) SS.
COUNTY OF TULSA)

I, KATHIE SCHIERMEISTER, a Certified Shorthand Reporter in and for the State of Oklahoma, do hereby certify that the foregoing is a true and correct record of my notes

taken in Case No. CJ-90-958, heard on the 9th, 10th, 11th, and 12th days of March 1992.

I further certify that I am not related to nor attorney for either of said parties nor otherwise interested in said action.

WITNESS MY HAND AND SEAL this 14 day of September 1992.

S/S Kathie Schiermeister
Kathie Schiermeister, CSR, CP-RPR, CM
Official District Reporter

Kathie Schiermeister
Oklahoma Certified Shorthand Reporter
Certificate No. 00351

§ 2615. Exclusion of Witnesses

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses. The court may make the order of its own motion. This rule does not authorize exclusion of:

1. A party who is a natural person;

2. An officer or employee of a party which is not a natural person designated as its representative by its attorney;

3. A person whose presence is shown by a party to be essential to the presentation of the party's cause; or

4. The victim of an alleged criminal offense or a representative of said victim, in any criminal prosecution, upon the motion of the state to bar such exclusion, unless the court finds such exclusion to be in the interest of justice.

Laws 1978, c. 285, § 615, eff. Oct. 1,1978. Laws 1988, c. 109, § 1, eff. Nov. 1, 1988; Laws 1991, c. 62, § 5, eff. Sept. 1, 1991.

§ 24. Private property—Public use
Character of use a judicial question

Private property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three free-holders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, without the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question.